



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 29th day of July, 1998

Asiana Airlines

Served July 29, 1998

**Violation of 49 U.S.C. § 41302,
49 U.S.C. § 41703 and 49 U.S.C. § 41712**

CONSENT ORDER

This order concerns unauthorized cargo service by Asiana Airlines, a foreign air carrier of Korea, between Seattle and Guam via Seoul in violation of 49 U.S.C. § 41703, which prohibits foreign carriers from engaging in air commerce between two U.S. destinations, a form of service referred to as cabotage.¹ In addition, holding out to the public, expressly or by course of conduct, that a foreign air carrier provides any such service, without appropriate exemption authority, violates the carrier's permit authority issued under 49 U.S.C. § 41302 and constitutes an unfair method of competition and an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712.

Asiana, which holds permit authority from the Department for passenger and cargo service between points in Korea and several points in the U.S., including Seattle, offered its Seattle-Guam service by means of its Internet site (on the World Wide Web) which allows a shipper to request a list of available services between certain destinations. Both Seattle and Guam are among the points listed on the site's destination menus, and a shipper, by selecting the two points, would receive a schedule of services between Guam and Seattle, by way of Seoul. This and similar displays constitute a holding out of unlawful cabotage service on the part of Asiana. We have also obtained evidence that the carrier, on several occasions in 1997, accepted shipments for transportation between the two points, pursuant to single waybills, and provided the service in question. Waybills which indicate

¹ The pertinent language of 49 U.S.C. §41703 states that foreign civil aircraft may "take on for compensation, at a place in the United States, passengers or cargo destined for another place in the United States only if - (1) specifically authorized under section 40109(g) of this title. . ."

points in the U.S. as both the origin and destination of a shipment are strong, albeit not conclusive, evidence that the carrier sought and carried revenue traffic between two U.S. points, although the waybills themselves may often be prepared by air freight forwarders. In this instance, the subject waybills appear not to have been prepared by Asiana.

It is the position of the Enforcement Office that Internet sites of foreign carriers which are accessible to members of the general public may not display itineraries in which the origin and destination are both points in the U.S. Foreign carriers should modify their screens so that in response to a query requesting service between two U.S. points, the displays return a response that the carrier provides no services between the points selected. On the other hand, we have no objection to a carrier showing service between its homeland and two U.S. points, if the display is in response to two separate queries, one for service from a point in the U.S. to a destination in the carrier's homeland, and a second request for service between that homeland point and a second point in the U.S. The display should not, however, permit a viewer to construct service from one point in the U.S. to another.

In mitigation and explanation, Asiana denies that it engaged in any unauthorized services between two U.S. points in violation of 49 U.S.C. § 41703, of which Asiana has no history of violation. The carrier notes that the Department bases its current enforcement action upon a cargo routing that originated in Seattle, stopped in Seoul, and continued through to Guam on a different aircraft with a different flight number. Asiana believes that this service is fully consistent with its underlying authority and represents connecting Fourth and Third Freedom services. In any event the illegality of the alleged cabotage service is, in Asiana's view, at best debatable since prior to this Consent Order there were not articulated guidelines that could provide a foreign carrier with notice as to what constitutes a legal break in the journey vis-à-vis prohibited cabotage. Asiana believes that the Department's definition of cabotage is overbroad and inconsistent with the spirit of the Open Skies negotiations.

The Department's insistence that Asiana has "held out" unauthorized services over the Internet raises novel issues that, according to Asiana, should be resolved through a rulemaking or policy statement addressed to the entire industry, not by an enforcement action against a small foreign carrier operating in the midst of an economic crisis. In any event, Asiana states that it has not solicited or advertised cargo services between Seattle and Guam on the Internet or otherwise. Penalizing Asiana for "holding out" on its interactive Internet home page, the carrier maintains, would establish a new industry rule that is at best inconsistent with previous Department guidance, and, in any event, would be an *ex post facto* penalty — there was no prior notice that what Asiana did was illegal, the carrier states. It is inherently unfair, Asiana asserts, to penalize it for violations of federal law without adequate public notice as to the prohibited conduct.

The provision and holding out of unauthorized service by a foreign carrier, in this case involving cabotage, is a serious enforcement matter. The transportation of passengers or cargo between two U.S. points by a foreign carrier, even with an intermediate stop at a point in the carrier's homeland, is strictly prohibited by federal statute. Asiana's service between Seattle and Guam, notwithstanding its stopover in Seoul and its change of aircraft at that point, constituted the transportation of goods from one point in the U.S. to another and the holding out of this service in violation of 49 U.S.C. § 41703. Moreover, it was the intent of the carrier to perform such transportation.

We recognize that where there is a break in travel at the intermediate point in the foreign carrier's homeland, for business or personal reasons, and the transportation is pursuant to separate waybills or tickets, a foreign carrier may carry traffic that originates and terminates at two U.S. points without thereby violating the prohibition on cabotage. However, the carrier would not be permitted to hold out or advertise service between two U.S. points under any circumstances. In this instance, there was no such break in the transportation of goods by Asiana from Seattle to Guam via Seoul, the availability of this behind homeland connecting service could be discovered at Asiana's Internet site, and single waybills were issued by the air freight forwarder for the service.

After considering all the facts in this matter, the Enforcement Office believes that an appropriate remedy in this instance includes a requirement that Asiana modify its Internet site to remove displays that show service between two U.S. points, or cabotage service. This order also provides for a civil penalty of \$19,000, assessed under 49 U.S.C. § 46301, which reflects the extent of the holding out violations and the extent of service in the market at issue, and directs Asiana to cease and desist from future violations of 49 U.S.C. § 41302, 49 U.S.C. § 41703 and 49 U.S.C. § 41712. Of the civil penalty amount, Asiana shall pay \$9,500 in three installments according to the 15-month schedule set forth in the ordering paragraphs below. The remaining \$9,500 shall be suspended during the 15-month payment period and shall then be forgiven unless Asiana fails to comply with the payment provisions of this order or provides other cabotage service during this period, in which case the entire unpaid portion of the \$19,000 assessed penalty shall become due and payable immediately. The Enforcement Office believes that the assessment of this civil penalty reflects the extent of the violations in question and the current financial condition of the carrier.² We believe this order will provide an incentive to foreign air carriers to comply fully with the requirements of 49 U.S.C. § 41703 and related statutes with respect to cabotage service.

In order to avoid litigation and without admitting or denying the alleged violations described above, Asiana has agreed to the issuance of this consent order. In

² The carrier has provided documentation regarding its financial condition.

addition, Asiana states that it enters into this Consent Order as an efficient means of clarifying the Department's policies for Asiana and other foreign carriers that operate similar routes. This order is further intended to offer a clarifying statement as to the policy of the Enforcement Office with respect to the holding out of services on Internet facilities and to provide an incentive for all air carriers to place accurate statements of their respective authorized services on this medium.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Asiana Airlines violated 49 U.S.C. § 41302, 49 U.S.C. § 41703, and 49 U.S.C. § 41712 by performing cargo air transportation between two points in the U.S., Seattle and Guam, via Seoul, and allowing information concerning such service to be obtained by customers at its Internet site;
3. We order Asiana Airlines to cease and desist from further violations of the statutory provisions cited in paragraph 2, *supra*;
4. Asiana shall modify the display of its Internet Web site to reflect the guidelines issued above. The Department may provide further guidance to Asiana, as requested, in the modification of the site to conform to the new policies;³
5. Asiana Airlines is assessed \$19,000 in compromise of civil penalties that might otherwise be assessed under 49 U.S.C. § 46301 for the violations found in ordering paragraph 2 of this order. Of this amount, \$9,500 shall be paid in three installments according to the following schedule: the first payment shall be in the amount of \$3,500 and shall be due within 30 days of the service date of this order; the second payment, of \$3,000, shall be due no later than 8 months (240 days) following the service date; the final payment, also of \$3,000, shall be due no later than 15 months (450 days) after the service date of this order. The remaining \$9,500 of the penalty assessed here shall be suspended for 15 months following the service date of this order and shall be forgiven unless Asiana Airlines fails to comply with the payment provisions of this order or commits other violations of 49 U.S.C. § 41301, 49 U.S.C. § 41703, or 49 U.S.C. § 41712 by providing cabotage service without appropriate exemption authority, during that period, in which case the entire unpaid portion of the assessed penalty shall become due and payable immediately and the carrier may be subject to further enforcement action; and

³ The Enforcement Office has confirmed that a Seattle-Guam itinerary can no longer be created at the Asiana Internet site.

6. Payments shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed wire," to the account of the U. S. Treasury in accordance with the attached instructions. Failure to pay the penalty as ordered will subject Asiana Airlines to the assessment of interest, penalty and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

An electronic version of this document is available on the World Wide Web at:
<http://www.dot.gov/dotinfo/general/orders/aviation.html>